Supreme Court, U.S.
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IN THE
United States Supreme Court
OCTOBER TERM, 1971

No. 71-648

RAMON D'EUGENIO,
Petitioner,

-against-

SLATTERY CONSTRUCTION CO. INC.,
Respondent.

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Page

Jurisdiction 2

Question Presented 3

Page 2 Of Respondent's Brief Under The Heading "Statement" Claims Lack Of Proof As To Length Of Time The "Excavating Operation Had Continued" 3

Conclusion 5

Cases Cited

Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945) 1

Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241 4

United States v. Thoresen, 281 F. Supp. 598 (1967) 4

Other Authorities

New York Labor Law § 241 2

United States Constitution - Fifth and Fourteenth Amendments 2

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Respondent endeavors to give sanctification to State Court judgments, denying to this Court the right to review.

As authority for such radical departure from well settled and controlling law, respondent has failed to note the very prerequisite which has been the basis for "...the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." (*Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945)).

Petitioner is not seeking "to revise opinions" but is asking this Court "to correct wrong judgments".

The right to ask for the relief prayed for by petitioner to correct wrong judgments is not subject to question and has been conceded on pages 3 and 4 of respondent's brief.

Petitioner has been denied "due process of law" as provided by the fifth and fourteenth amendments of the United States Constitution.

The brief for respondent in opposition to the petition herein argues that the provisions of § 241 of the New York Labor Law are not unconstitutional.

This is not the question before this Honorable Court.

Petitioner does not claim that the language of the statute is repugnant to the Constitution.

Petitioner has claimed from the very inception of the trial before the Hon. Samuel Leibowitz, Supreme Court Trial Judge, that the statute provides remedial rights, including a cause of action against the general contractor for the consequences of a cave in of the walls of a deep and dangerous ditch which buried and injured the petitioner.

Petitioner demonstrated that such remedial rights are provided by the State statute and have been generally granted to persons injured under identical circumstances to that of petitioner, and that the denial to the petitioner of his day in Court on the merits constituted an erroneous interpretation of the provisions of § 241 of the New York Labor Law, as amended October 1, 1962, which erroneous interpretation is just as repugnant as violation of due process of law, as if the statute itself was unconstitutional.

JURISDICTION

This Court is asked to correct a wrong judgment which has denied to petitioner due process of law as guaranteed by our Constitution.

QUESTION PRESENTED

The question presented is whether a correct statute has been incorrectly interpreted so as to result in depriving petitioner of his constitutional rights to a trial on the merits.

PAGE 2 OF RESPONDENT'S BRIEF UNDER THE HEADING "STATEMENT" CLAIMS LACK OF PROOF AS TO LENGTH OF TIME THE "EXCAVATING OPERATION HAD CONTINUED".

The trial record pages (A23, A24) shows at least ten years duration, as testified to by Eugene C. McCaffrey, New York State Department of Labor Inspector as follows:

"Q Has he done the job the same way that he did this job in other cases?

A You mean as far as the sheathing, shoring?

A Yes.

Q And this was just in accordance with the way he's been doing things?

A That is right.

Q Over how many years?

A Well, I don't know exactly how many years he's in business, but I do know –

Q As far as you know.

A As much as I can remember, it must be at least ten years."

The length of time would be immaterial as the operation was inherently dangerous. Mr. McCaffrey testified at page A32:

"Q Now, assuming that the trench is dug twice the length of the waler, will you consider that good and safe practice or dangerous practice?

A I would say it's inherently dangerous."

The argument that this Court does not have jurisdiction is baseless, as the very authorities cited by respondent at pages 3 and 4 of its brief demonstrate jurisdiction.

In addition, the question of Constitutional rights are always matters within the power of this Court to review. *Tot v. United States,* 319 U.S. 463, 63 S.Ct. 1241; *United States v. Thoresen,* 281 F. Supp. 598 (1967).

The manner of interpreting a statute is severable from the wording of the statute, and although the statute as read may be constitutional, the manner of its application may be repugnant, as in the instant case, to the Constitution of the United States.

In the case of *United States v. Thoresen, supra,* the Court stated at page 608:

"This Court adopts the below quoted portion of an opinion in Velazquez v. Hunter, 159 F. 2d 606 (10th Cir. 1947) which deals with the same contention:...."

Review is sought of a judgment by the Appellate Division which is the highest Court which was available to petitioner on a State Court level, leave to appeal further was denied.

No provision for further appeal exists although the question of violation of the U.S. Constitution was specifically raised in the Courts below.

On page 5 of respondent's brief, an attempt is made to justify the manner of the interpretation of § 241 of the New York Labor Law. Whether or not other State Courts have ruled in a manner comparable to that of the Courts below in the instant case is not dispositive of the question before this Honorable Court.

The simple fact is that claimants generally have been granted the right to maintain a cause of action under identical circumstances on the basis of Section 241 of the New York Labor Law as amended October 1, 1962, and petitioner was denied the same right.

CONCLUSION

It is respectfully submitted that the petition is meritorious.

Respectfully submitted,

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